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IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,

v.

CHARLES BURR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page iii of their opening brief, and there are no amendments to that Statement.

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INTRODUCTION

I. Respondents' proposed interpretation — under which a "willful" violation of FCRA requires mere "reckless disregard" — conflicts with the text of FCRA, undermines the structural integrity of the statute's remedial scheme, and contravenes the intent of Congress in § 1681n. Respondents ask this Court to read into FCRA a convoluted, four-tiered remedial scheme that Congress did not adopt and that borders on incoherence. The far better reading of the statute is that Congress created a straightforward, two-tiered scheme in which plaintiffs can recover full compensation (actual damages, attorney's fees, and costs) for "negligent" violations and can avail themselves of the quasi-criminal remedies of statutory and punitive damages only by proving that the defendant knew that its conduct violated FCRA. This reading is more faithful to the text, structure, and history of FCRA for four principal reasons.

First, as this Court has pointed out on no fewer than seven occasions, there is no "plain" meaning of "willful." The word must be interpreted in its context, and this Court's reading of the term in one statute cannot be transplanted unreflectively to another. In their effort to equate "willful" and "reckless," respondents rely on decisions interpreting statutes that differ in pivotal respects from FCRA. The interpretive principle they espouse, moreover, would render incoherent a wide variety of other statutes that require a showing of "willful *or* reckless" conduct — a disjunctive formulation that is incompatible with respondents' theory that the terms are synonymous.

Second, respondents' characterization of FCRA as a four-tiered scheme — contemplating separate remedies for negligent, reckless, knowing, and "knowing and willful" violations — distorts the statutory structure and would lead to a crazy quilt of difficult-to-distinguish intent standards that Congress could not reasonably have intended. Respondents treat § 1681n(a)(1)(B) as if it were a free-standing provision establishing a separate category

of aggravated liability for "knowing" (as distinguished from "willful" or "knowing and willful") violations. But § 1681n(a)(1)(B) is a *subsection* of § 1681n(a), and the term "knowingly" in § 1681n(a)(1)(B) must therefore be read in conjunction with "willful" in the overarching language of § 1681n(a). In its textual context, "willful" logically must entail "knowing" conduct, not mere recklessness: it is nonsensical to read § 1681n(a) and § 1681n(a)(1)(B) together to prohibit *recklessly* obtaining a consumer report "knowingly without a permissible purpose."

Equally important, Congress's use of "willful" in conjunction with "knowing" in § 1681n(a)(1)(B) indicates that it intended the *mens rea* standard for quasi-criminal statutory and punitive damages under § 1681n to be the same as for criminal liability under § 1681q and § 1681r. Indeed, both respondents and their *amici* concede that Congress's 1996 amendments enacting § 1681n(a)(1)(B) adopted "the same standard used in the criminal provision." Resp. Br. 25. Because the criminal provision requires knowing conduct, the provision at issue here must likewise require knowing conduct.

Third, as pointed out in our opening brief (at 25-26), the statute's drafting history shows that Congress understood "willful" conduct to require something more than "gross negligence." Though respondents and the United States argue that there is a difference between "reckless disregard" and "gross negligence," neither can articulate that difference in any intelligible way. Congress is presumed to understand the seriousness of punitive damages, as a matter of both public policy and constitutional law, and there is no reason to believe that Congress meant such dramatic remedial consequences to hinge on an at best insubstantial distinction between "gross negligence" and "reckless disregard."

Fourth, consistent with the text, structure, and history of FCRA, the federal courts of appeals have consistently held for more than 20 years that "willful" violations

require "knowing" rather than merely "reckless" conduct. Congress has twice amended FCRA — and has once amended § 1681n specifically — since those precedents became clearly established, but it has made no change in the language on which those decisions were predicated. This longstanding circuit precedent, and Congress's failure to overturn it, undermines respondents' attempt to read "willful" to mean "reckless."

II. Reversal in this case would be warranted even if the Court were to leave open the possibility that some unknowing but "reckless" behavior can give rise to liability for statutory and punitive damages under § 1681n. As the United States confirms, and as even respondents acknowledge at various points in their brief, to act "recklessly" means, at a minimum, to "'proceed[] in disregard of a high and excessive degree of danger'" that the conduct is unlawful. Resp. Br. 45, 46 (quoting *Prosser and Keeton on the Law of Torts* § 34, at 214 (5th ed. 1984) ("*1984 Prosser & Keeton*")); *see* U.S. Br. 21. This is an objective threshold standard, and that is especially true when the issue is whether the defendant undertook a risk of *legal error* that was so dangerously "high and excessive" as to constitute an "extreme departure from standards of ordinary care." U.S. Br. 21. This standard requires an objective inquiry into whether Safeco's conduct "ran afoul of clearly established law" or showed indifference "to an objectively high and obvious risk of unlawfulness." *Id.* at 22-23.

Here, as the United States explains, the undisputed objective facts demonstrate that the alleged illegality was not "obvious." Whether FCRA's notice requirement applies to initial applications for insurance was "itself an issue of first impression." *Id.* at 29. The statute's text provides no clear answer to the question, and no court had adopted the reading urged by respondents at the time of the conduct at issue. *See id.* Moreover, the FTC itself, speaking through the brief for the United States, has rejected respondents' claim that an informal and explicitly

non-binding advisory letter by a single FTC staff attorney was sufficient to provide definitive guidance to companies about the FTC's reading of the Act. *See id.* at 29-30 & n.24.

On these facts, Safeco is entitled to summary judgment, and the Ninth Circuit's contrary determination should be reversed. Application of the "willful" requirement to the circumstances presented here is clearly encompassed in the petition for certiorari, which expressly contended that the district court's summary judgment should have been affirmed because of these same facts. *See* Pet. 16; Pet. Reply 8-9. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court not only resolved the meaning of the "willfulness" standard, but also held that the court of appeals had misapplied the standard to the facts presented. The Court has done the same thing in other cases as well, and it should follow that course here. Remand to the Ninth Circuit without application of the proper "willfulness" standard would be inconsistent with prior Court decisions, would fail to provide much needed guidance to courts and litigants (which will gain much by this Court's demonstration of what the general legal standard means in practice), and would create an unnecessary and unwarranted waste of judicial and private resources through needless further proceedings.

ARGUMENT

I. READING "WILLFUL" TO REQUIRE ACTUAL KNOWLEDGE OF ILLEGALITY BETTER ACCORDS WITH THE TEXT, STRUCTURE, AND HISTORY OF FCRA

A. "Willful" Does Not — as a Matter of "Plain Meaning" or Legal Presumption — Include "Reckless"

Adopting the reasoning of the court of appeals, respondents suggest that the "plain" or at least presumptive meaning of the term "willful" includes "reckless." Resp. Br. 17-18; *see also id.* at 25-29, 35. The clear and repeated teaching of this Court's precedents, however, is that the

interpretation of "willful" is an inherently statute- and context-specific inquiry. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *Spies v. United States*, 317 U.S. 492, 497 (1943).

In each case in which this Court has interpreted the term "willful" to include some kind of non-knowing conduct, it has done so based on the particularities of the statute at issue. *See* Pet. Br. 30-31; *Thurston*, 469 U.S. at 128 (relying on the legislative history of the Age Discrimination in Employment Act of 1967 ("ADEA")); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 131-33 (1988) (analyzing the structure of the Fair Labor Standards Act of 1938 ("FLSA")); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (relying on accepted judicial interpretation of the FLSA). None of these decisions embraced a generally applicable interpretive rule to the effect that "reckless" conduct is invariably sufficient to satisfy a statutory "willfulness" standard.

This Court's insistence on a nuanced and context-sensitive interpretation is a sound one. Numerous federal statutes use the term "willful" in contradistinction to "reckless" (or its synonym, "grossly negligent") as the threshold requirement for imposing civil or criminal penalties or for administrative enforcement.[1] Significantly, a

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[1] For statutes that use "willful" as distinct from "reckless," see, *e.g.*, 18 U.S.C. § 2724(b)(2) (permitting recovery of punitive damages for improper use of motor vehicle records "upon proof of willful or reckless disregard of the law"); 26 U.S.C. § 6694(b) (providing for $1,000 civil penalty if a tax preparer understates the taxpayer's liability due to either "willful" or "reckless" disregard of rules or regulations); 49 U.S.C. § 5124(a) (providing for criminal penalties against anyone who "willfully or recklessly" violates federal laws or regulations regarding the transportation of hazardous materials).

For statutes that use "willful" as distinct from "grossly negligent," see, *e.g.*, 12 U.S.C. § 1829b(j) (providing for a civil penalty of up to $10,000 for any "insured depository institution" that "willfully or through gross negligence violates" any recordkeeping regulation prescribed by the Secretary of the Treasury); *id.* § 1955(a) (providing

provision of the Truth in Lending Act, a close cousin of FCRA, distinguishes between "gross negligence" and "willful violation[s]" and prescribes different agency action with respect to each category. *See* 15 U.S.C. § 1607(e)(2). These statutes belie the United States' contention (at 10) that there is a "generally established understanding" that "willful" includes "reckless" in civil statutes. To adopt a generally applicable interpretive principle that equates the two terms would render redundant or incoherent the many statutes in which Congress has used "willful" to mean something different from "reckless."

B. Interpreting "Willful" To Require a Knowing Violation Better Conforms with the Text and Structure of FCRA

As explained in our opening brief, the better reading of FCRA is that Congress reserved the drastic remedies of statutory and punitive damages in § 1681n(a) for knowing violations, while permitting actual damages, attorney's fees, and costs for non-knowing (negligent or reckless) violations. None of the objections to this reading offered by respondents or the United States is persuasive, and the contrary reading suffers from serious problems of incoherence and irrationality.

Respondents contend that, "[h]ad Congress intended the word 'willful' in the beginning of section 1681n(a) to require a knowing violation, the additional requirement in the following subsections [§ 1681n(a)(1)(B) and § 1681n(b)] that the defendant 'know' that it did not have a permissible purpose under FCRA would be rendered insignificant if not superfluous." Resp. Br. 19; *see* U.S. Br. 13. But the word "willful" in § 1681n(a), which

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a similar $10,000 penalty against "any person" for "each willful or grossly negligent violation" of any Treasury regulation governing financial recordkeeping); 42 U.S.C. § 14924(c)(1) (providing for withdrawal of accreditation of adoption agencies for "serious, willful, or grossly negligent failures to comply" with regulatory requirements); 43 U.S.C. § 299(k)(2) (creating a cause of action for "double damages plus costs" against a mine operator "for willful misconduct or gross negligence").

applies generally to all substantive bases for liability under FCRA, has a "perfectly straightforward job[] to do" with respect to those causes of action covered by § 1681n(a)(1)(A) — namely, it defines the required state of mind. *Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006).

With respect to § 1681n(a)(1)(B), any minor redundancy is outweighed by the far worse anomaly that would be created by reading "willful" to mean "reckless." Because "reckless" conduct is done without knowledge of illegality, it is simply incoherent to prohibit "*recklessly*" obtaining a consumer report "*knowingly* without a permissible purpose." It makes more sense to tolerate a slight redundancy — one that is readily explainable by the history of Congress's amendments to § 1681n(a)[2] — than to inject an unsolvable contradiction into the heart of a key FCRA provision.

Respondents' suggestion (at 22-23, 27) that § 1681n(a)(1)(B) creates a separate remedial "tier" prohibiting "knowing" (as opposed to "reckless") conduct is also unfaithful to the structure of FCRA because it treats § 1681n(a)(1)(B) as if it were a separate, freestanding section rather than a subsection of § 1681n(a). Respondents concede that, to recover under § 1681n(a)(1)(B), a plaintiff must show "a knowing violation." Resp. Br. 22; *see id.* at 23. They further acknowledge that Congress incorporated into § 1681n(a)(1)(B) the "same standard used in [§ 1681q]," one of FCRA's criminal provisions. *Id.* at 25; *see also* Brief Amici Curiae of the National Consumer Law Center, *et al.*, at 15 ("Congress endorsed that approach when it copied the § 1681q 'knowingly and willfully' language wholesale into § 1681n(a)(1)(B)."). Those concessions are dispositive here: the *mens rea* in § 1681n(a)(1)(B) cannot possibly be different from that of § 1681n(a), because both are governed by the same "willful" language. If a term appearing in several *different* places in a statute should be "read the same way each

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[2] Congress added § 1681n(a)(1)(B) in 1996, when § 1681n(a) already provided for punitive damages for all "willful" violations of the Act.

time it appears," *Ratzlaf*, 510 U.S. at 143, *a fortiori* a single word in a single provision should be read the same way each time it is applied. The only logical way to reconcile the "willful" and "knowing" language in § 1681n(a) and § 1681n(a)(1)(B) is to recognize that Congress intended for statutory and punitive damages to be reserved in all cases for only the most egregious "knowing" violations of FCRA's highly technical requirements.[3]

This conclusion is confirmed by § 1681n(b), which both respondents and the United States concede also requires a showing of actual knowledge. *See* Resp. Br. 22, 23; U.S. Br. 14. Unlike § 1681n(a), however, § 1681n(b) does *not* allow punitive damages even for a knowing violation. Respondents offer no coherent explanation why it would make sense for Congress to authorize the severe remedy of statutory and punitive damages in § 1681n(a) on a showing of intent that is *lower than* that required in § 1681n(b).[4] *See* Pet. Br. 21-22. Nor do respondents explain why Congress would have allowed private plaintiffs to recover potentially uncapped punitive damages for "reckless" conduct while limiting the FTC's administrative remedies under § 1681s(a)(2) to statutory damages for even "knowing" conduct. *See id.* at 22.

Contrary to the convoluted, multi-tiered scheme fashioned by respondents, the better and more straightforward reading of FCRA is that Congress created a two-tiered scheme in which private plaintiffs may recover compensatory damages for all forms of negligent conduct, but may recover statutory and punitive damages only for knowing violations. This does not, contrary to the United

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[3] Reading "willful" to require knowledge does not make the "knowing and willful" language of § 1681q and § 1681r redundant or nonsensical. "Willful and knowing" is a term of art often used, without redundancy, in criminal statutes. *See Bryan*, 524 U.S. at 191.

[4] The title to § 1681n — "Civil liability for willful noncompliance" — further indicates that Congress meant the *entire section* to cover "willful" violations. Section 1681n(b) is a subsection of § 1681n — indicating that Congress saw no distinction or inconsistency between the two *mens rea* standards.

States' contention, leave "reckless disregard" of FCRA a "statutory orphan." U.S. Br. 16-17. That "reckless disregard" does not give rise to a separate "tier" of remedy is the product of Congress's specific decision to reduce the standard for actual damages in § 1681*o* from "gross negligence" to simple negligence. *See infra* Part I.C.

C. The Drafting History of FCRA Evidences Congress's Intent To Require Knowing Noncompliance as a Prerequisite to Statutory and Punitive Damages

Neither respondents nor the United States offer a persuasive rejoinder to the drafting history of FCRA. The Senate bill on which FCRA was based originally established "willful" conduct as the standard for punitive damages and "gross negligence" as the standard for *actual* damages under what eventually became § 1681*o*. As originally written, therefore, "willful" conduct was understood to denote a higher degree of culpability than "gross negligence." The United States contends that "willful" could still mean "reckless" rather than "knowing" because some courts have in the past found a theoretical difference between "gross negligence" and "reckless disregard." U.S. Br. 16 (citing *Prosser and Keeton on the Law of Torts* § 34, at 183 (4th ed. 1971)). But it is absurd to conclude that the bill would have created such a massive discrepancy in consequences based on so thin a distinction. *See Farmer v. Brennan*, 511 U.S. 825, 836 n.4 (1994) (noting that the term "gross negligence" "in practice typically mean[s] little different from recklessness as generally understood in the civil law") (citing *1984 Prosser & Keeton* § 34, at 212).

On the other hand, there is nothing odd about reducing the standard for actual damages from "gross negligence" to simple negligence. *Contra* U.S. Br. 16. As explained in our opening brief, an actual negligence rather than a gross or aggravated negligence standard in § 1681*o* is tailored to enforce FCRA's central aim of making companies formulate "reasonable procedures" for complying with FCRA's substantive provisions. *See* Pet. Br. 32-34; *see*

also U.S. Br. 20 (acknowledging that "FCRA demands, as its starting point, that regulated entities take reasonable measures and strike reasonable balances"). Congress fully understood the competing policy objectives of preserving the privacy and accuracy of consumer information while also facilitating the use of such information in the economy, and it struck a delicate balance between those objectives by promoting "reasonable" procedures. *See* Pet. Br. 32. Congress presumably lowered the standard for actual damages because it recognized that compensatory damages for actual negligence better furthered those twin aims. That recognition does not detract, however, from Congress's simultaneous policy judgment in § 1681n that punitive and statutory damages — which exact a potentially enormous financial toll on defendants and provide a huge windfall to plaintiffs' lawyers, all in the absence of any showing of actual harm — should be reserved for knowing violations.

D. Settled Judicial Interpretation of FCRA Further Supports Reading "Willful" To Require Knowing Noncompliance

The federal courts of appeals interpreting § 1681n(a) have consistently held for the past 20 years that, to establish that a person "willfully fail[ed] to comply" with FCRA, a plaintiff must prove that the defendant "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986); *see* Pet. Br. 27-28 & n.8. This Court has repeatedly looked to such established precedent as a guide for interpreting federal *mens rea* provisions. *See Ratzlaf*, 510 U.S. at 141; *Hazen Paper*, 507 U.S. at 614; *Thurston*, 469 U.S. at 126. In *Thurston* and *Hazen Paper*, settled precedent supported a "reckless disregard" standard. Here, in contrast, consistent judicial interpretation of FCRA supports an actual-knowledge standard.[5]

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[5] Respondents' citation to cases recognizing that punitive damages under state law could be sustained on a showing of reckless disregard is off the mark. *See* Resp. Br. 35 n.21. Respondents point to no evi-

This circuit precedent was established prior to Congress's 1996 amendments to FCRA, which included significant changes to § 1681n.[6] Congress's refusal to disturb this consistent judicial precedent carries special significance because, as this Court has held, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

* * *

In sum, all indicators from the text, structure, and history of FCRA support the conclusion that, to qualify as "willful," a violation must be committed with actual knowledge that one's actions violate the Act. Even if there were residual doubt, the rule of lenity counsels strongly in favor of that conclusion. *See* Pet. Br. 35-36.[7] The Ninth Circuit's judgment should be reversed on this ground. *See id.* at 37.

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dence in the text, structure, or history of FCRA that Congress intended "willful" to incorporate these state-law standards.

[6] Contrary to respondents' assertions, the four circuits that had addressed the issue by 1996 had clearly held that "willful" required proof of a knowing violation. The language in these decisions was not *dicta*: the courts not only enunciated the legal standard but also applied that standard to the facts before them. *See* Pet. Br. 28-29 & n.9. Nor did these cases apply the criminal provision of § 1681q to a *civil* case; rather, they simply recognized that Congress intended to apply similar intent standards to violations of § 1681q and § 1681n. *See Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 971-72 (4th Cir. 1987).

[7] Contrary to respondents' argument, the rule of lenity should apply with full force here given the recognized "quasi-criminal" nature of punitive damages. *See* Pet. Br. 35-36. Indeed, the policies behind the rule of lenity are particularly strong in the context of § 1681n, which creates the specter of massive statutory and punitive damages for violations of a technical statutory provision that frequently, as in respondents' case, cause no harm.

II. REVERSAL IS REQUIRED EVEN IF SOME "RECKLESS" CONDUCT QUALIFIES AS "WILLFUL" BECAUSE A FINDING OF "RECKLESS DISREGARD" IS FORECLOSED BY THE UNDISPUTED FACTS

Even if this Court were to decide that a "willful" violation of FCRA is broad enough to include some "reckless" conduct that does not involve a "knowing" violation of the law, reversal of the court of appeals' decision vacating summary judgment is nonetheless warranted. The Ninth Circuit's remand to the district court was improper because undisputed objective facts indicate that Safeco's decision not to provide "adverse action" notices to initial applicants for insurance neither violated clearly established law nor ignored an obvious illegality — and therefore could not be reckless.

A. Safeco's Conduct in This Case Is Not "Reckless" as a Matter of Law

As the United States explains in its *amicus* brief, and as respondents effectively concede, reckless disregard for the law requires, at its core, that the defendant have acted "in the face of an unjustifiably high risk" that its conduct will be unlawful. *Farmer*, 511 U.S. at 836. An "unjustifiably high risk" connotes an "aggravated deviation from the standard of ordinary care" that is "so wrongful under the circumstances that it is a proxy for or functionally equivalent to knowing or intentional conduct." U.S. Br. 21.

In this context, where the question of recklessness hinges on whether Safeco ignored an obvious violation of the technical notice provisions of FCRA, the relevant inquiry must focus on the state of existing law at the time of the conduct at issue. As this Court held in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), even under the common-law standard that respondents embrace, punitive damages based on a finding of "reckless" conduct are inappropriate as a matter of law if the underlying theory of liability is "novel or otherwise poorly recognized." *Id.* at 537. Likewise, as the United States

explains, "when the concern is whether the disregard *of the law* was reckless, the extent to which the law was well-established and clearly understood must be part of the analysis." U.S. Br. 22 (emphasis added). Where the law is not "clearly established," it simply cannot be said that a defendant's noncompliance "'takes on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care where a high degree of danger [of illegality] is apparent.'" Resp. Br. 46 (quoting *1984 Prosser & Keeton* § 34, at 214); *see also Screws v. United States*, 325 U.S. 91, 105 (1945) ("willful" conduct means "act[ion] in open defiance or in reckless disregard of a [legal] requirement which has been made specific and definite") (plurality).

The United States' analogy to qualified immunity is apt: Congress's requirement of "willful" conduct must require (at the very least) "violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness." U.S. Br. 23. Indeed, contrary to respondents' contention (at 47), the argument for a "clearly established" standard is even more powerful under FCRA. Qualified immunity is a judge-made doctrine that often inoculates public officials from individual liability for even compensatory damages for actual (and sometimes egregious) physical harm. By contrast, a "clearly established" standard under § 1681n does not restrict plaintiffs' access to compensatory damages, *see* 15 U.S.C. § 1681*o*, but merely limits the imposition of quasi-criminal statutory and punitive damages for purely technical statutory violations — a result that is more consonant with Congress's express purpose of balancing the legitimate interests of businesses and consumers in the use of credit information. *See* Pet. Br. 32-35. Moreover, a "clearly established" standard is needed to protect the vital role of the attorney-client privilege, which would be severely compromised if defendants routinely needed to mount a subjective good-faith defense even where their conduct was not objectively reckless. *See Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (refusing to adopt exception to Fifth

Amendment privilege against self-incrimination that "could interfere with the attorney-client privilege").

It is appropriate, moreover, for courts to apply this objective "clearly established" test at the threshold, before inviting an intrusive inquiry into a defendant's subjective state of mind. *Cf. Saucier v. Katz*, 533 U.S. 194, 202 (2001). Absent a "highly unreasonable" risk of illegality, whether the defendant subjectively appreciated that risk is of no moment: "[o]nly if the defendant's failure to comply with the law was objectively reckless [sh]ould it become necessary for a court to probe, as the court of appeals invited here, the defendant's subjective good faith." U.S. Br. 23 (citation omitted). If conduct is not objectively unreasonable, there is no need to burden courts and defendants with discovery, especially where the discovery is as intrusive as that authorized by the Ninth Circuit, which would entail the disclosure of information protected by attorney-client privilege.

Whether a defendant acted in the face of clearly established federal law is an issue of law for the court, rather than a question of fact for a jury. Again, the analogy to qualified immunity provides useful guidance. As courts have routinely held, the question whether the law was "clearly established" for qualified immunity purposes is "a matter of law for the court, hence is always capable of decision at the summary judgment stage." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *see Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("[w]hether an asserted federal right was clearly established at a particular time . . . presents a question of law"). Although respondents repeatedly assert that the question whether conduct is "willful" is generally a jury question, they offer no coherent explanation for how a lay jury could properly assess whether the text of FCRA and case law interpreting it put Safeco on clear notice of its obligations under the law.

Judged against the proper standard, Safeco's conduct in this case cannot be held to have been reckless. Whether

"adverse action" notices had to be sent to initial applicants for insurance who received less than the best possible rate depends on the meaning of the term "increase in any charge" in the definition of "adverse action." 15 U.S.C. § 1681a(k)(1)(B)(i). At the time that Safeco decided against sending such notices, *no court* had ever held that the term "increase in any charge" applied to the initial price charged on a new policy of insurance. *See* U.S. Br. 29 (the question was "itself an issue of first impression").[8] Nor "had the [FTC] provided specific formal guidance on the question." *Id.* The FTC itself specifically disavows the single informal staff letter on which respondents attempt to rely. *See id.* at 29-30 & n.24. Moreover, although respondents never acknowledge it, that informal letter opinion states on its face that it was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm.[9]

In the absence of any authoritative judicial or administrative interpretation, Safeco's reading of the "increase in

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[8] *Mick v. Level Propane Gases, Inc.*, No. 98-CV-959, 1999 WL 33453772 (S.D. Ohio Sept. 29, 1999), never resolved the meaning of "adverse action"; it merely held that the question was a "common issue of law" for purposes of class certification. *Id.* at *15.

[9] Respondents also cite an educational pamphlet issued by the FTC and contend that Safeco could have sought informal guidance from the FTC under 16 C.F.R. § 1.1. *See* Resp. Br. 7, 49-50. The FTC itself declines to rely on either of these purported bases for a finding of "reckless disregard." *See* U.S. Br. 29. Because the FTC lacks substantive rulemaking authority under FCRA, *see* 15 U.S.C. § 1681s(a)(1), (e), even formal FTC interpretations of FCRA published in the Federal Register are "not substantive rules" but merely "advisory in nature." 16 C.F.R. § 1.73(a)(2). Moreover, seeking an advisory opinion from a federal agency on an ambiguous legal issue is hardly a routine precaution, and it would send ripples through the business community if failure to do so were held to be an "extreme departure from standards of ordinary care" sufficient to give rise to potentially uncapped punitive damages. Respondents' citation to *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001), is off point: while 16 C.F.R. § 1.1 may solve a facial vagueness challenge, the mere *failure* to seek such guidance certainly does not meet the heightened standard of "willful" conduct.

any charge" language of § 1681a(k)(1)(B)(i) cannot be said to disregard an "obvious" violation of the law. U.S. Br. 23. Indeed, as the district court agreed, the plainest and most natural interpretation of that phrase is that it refers to an increase in an actual, existing premium — not a nonexistent, hypothetical charge. *See* Pet. Br. 39-41. Moreover, respondents have no persuasive response to the serious policy problem — previously highlighted by the FTC itself in congressional testimony, *see id.* at 40 — that their proposed interpretation creates: namely, that tens of millions of notices will have to be sent to consumers each year, including consumers whose insurance rate was made *better* because of their good credit score and who thus would not be understood in ordinary terms to have suffered an "adverse action." *See id.* In all events, as the United States recognizes, "the statutory text is not so pellucid on the question" as to put parties on clear notice of their obligation to send notices to initial applicants who received higher than the best theoretically possible rate. U.S. Br. 29. In that context, Safeco's actions cannot be willful as a matter of law, and Safeco should not be subject to potentially billions of dollars in statutory and punitive damages (all without any claim of actual harm to consumers) merely because it guessed wrong as to how one court of appeals would ultimately resolve a novel and uncertain statutory question. *See Kolstad*, 527 U.S. at 537; *Screws*, 325 U.S. at 105 (plurality).

B. The Application of the "Willful" Requirement to These Facts Is Properly Before This Court

Respondents suggest that Safeco could at most obtain *vacatur* and remand, rather than reversal, because Safeco did not include a separate question presented addressing the proper application of the "willful" standard to the facts of this case. Resp. Br. 57. But the application of the correct "willfulness" standard to these judgments is well within the scope of the question presented by Safeco's petition and is properly before this Court.

Whether Safeco's conduct could be "willful" given the uncertainty in the law was an issue presented to and squarely decided by the Ninth Circuit.[10] Safeco's brief to the Ninth Circuit argued that, "[b]ecause the questions raised by Plaintiffs' claims involve issues of first impression, they cannot support a willful violation of FCRA." Safeco C.A. Br. 54. The Ninth Circuit rejected this contention and directed the district court on remand to undertake an intrusive inquiry into "how the company's decision was reached, including the testimony of the company's executives and counsel." Pet. App. 129a.

Safeco's petition for certiorari expressly objected to the Ninth Circuit's decision to remand, arguing that its conduct, as a matter of law, could not be "willful": "Had this case been heard in any of these other three circuits, the district court's decision granting summary judgment to defendants would have been affirmed. As a matter of law, defendants could not have known that they were violating FCRA's notice provisions given the absence of a single judicial opinion in the 35 years since FCRA's passage holding that these provisions are triggered in the context of initial policies for insurance and, further, given the fact that defendants' legal position on that question was later adopted in multiple district court decisions." Pet. 16; *see also* Pet. Reply 8 (asking the Court to grant certiorari in order "to apply the proper 'willfulness' standard to this case").

It is no objection that Safeco did not include a discrete question presented in its petition specifically "seek[ing] certiorari on the question of application of the legal standard to the facts." Resp. Br. 57. Issues are properly before the Court if they are "fairly included" within the question presented in the petition for certiorari. Sup. Ct. R. 14.1(a). Application of the law to the facts is "fairly included" in questions challenging the propriety of the court

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[10] Respondents are therefore mistaken when they assert that Safeco "ask[s] this Court to be the first court to rule" on the issue. Resp. Br. 57.

of appeals' legal standard. This Court, after all, "sit[s] to decide concrete cases and not abstract propositions of law." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); *see also California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted).

For these reasons, in analogous cases, this Court has not required a separate question presented before applying a newly announced legal standard to the case before it. Indeed, in *Thurston*, which respondents elsewhere cite as the most pertinent precedent, the Court granted certiorari on the question "[w]hether specific intent to discriminate is necessary to establish a 'willful' violation under the [ADEA]." Brief of Trans World Airlines at i, Nos. 83-997 & 83-1325, 1984 WL 566145 (U.S. filed May 17, 1984). As here, the district court had granted summary judgment for TWA, but the court of appeals reversed, finding that TWA's conduct could be "willful" if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983). This Court held that the court of appeals' articulation of the "willful" requirement in the ADEA was "acceptable," but then proceeded to hold that the court of appeals "misapplied" that standard because there was "no evidence that TWA acted in 'reckless disregard' of the requirements of the ADEA." 469 U.S. at 128-29, 130.

Likewise, in *James v. United States*, 366 U.S. 213 (1961), the Court granted certiorari to decide "[w]hether the receipt of embezzled funds . . . constitutes the receipt of taxable income in the hands of the embezzler." Brief for Petitioner at 3, No. 63, 1960 WL 98685 (U.S. filed Aug. 24, 1960). The case arose on appeal of the petitioner's conviction for a "willful" evasion of federal tax obligations. Although the Court held that embezzled funds were taxable income, abrogating its prior decision in *Commis-*

sioner v. Wilcox, 327 U.S. 404 (1946), it went on to hold that the petitioner could not, as a matter of law, be convicted for a "willful" violation of the tax laws, given that the Court had just overturned its prior decision on whether embezzled funds were income. *James*, 366 U.S. at 221-22.

Other cases are to the same effect: this Court regularly applies newly announced legal standards to the facts before it without requiring a separate question presented asking the Court to do just that, including twice just last Term. *See Burlington N. & S.F. Ry. Co. v. White*, 126 S. Ct. 2405, 2416 (2006) (resolving circuit split on retaliatory discrimination claim under Title VII and upholding jury verdict based on newly announced standard); *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) (applying standard for RICO liability and holding that no liability could exist as a matter of law).[11]

The Court should follow the same practice here. Because Safeco's conduct cannot be deemed "willful," and because this is an objective issue that turns purely on the text of FCRA and existing law, there is no need for further factual development on remand. *Vacatur* and remand to the Ninth Circuit would therefore be a waste of judicial resources. It would also deprive the lower courts of urgently needed guidance on the meaning and application of FCRA's willfulness requirement in concrete contexts.[12]

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[11] *See also, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (granting certiorari to decide whether plaintiff claiming fraud on the market must prove loss causation, and applying affirmative conclusion to dismiss complaint); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (applying newly established defenses under Title VII and finding them unavailable to defendants on the record facts).

[12] A number of cases are being held in the lower courts pending this Court's decision. *See, e.g., Murray v. New Cingular Wireless Servs., Inc.*, Nos. 06-2477 & 06-2722 (7th Cir. Oct. 17, 2006) (staying appeal pending decision in *GEICO* and *Safeco*); *Halton v. American Int'l Group Inc.*, Case No. 06-C-443 (E.D. Wis. Jan. 3, 2007); *Forrest v. JPMorgan Chase Bank, N.A.*, Case No. 06-C-298 (E.D. Wis. Dec. 19, 2006); *Johnson v. Juniper Bank*, Case No. 06-C-13 (E.D. Wis. Dec. 18,

All the factors cited by the United States to support reversal in *GEICO* warrant the same result in *Safeco*. *See* U.S. Br. 29-30. Without elaboration, however, the brief for the United States advocates *vacatur* and remand in this case, while urging reversal in *GEICO*. *See id.* at 30. There is no basis for differentiating between the two cases. As the United States' brief acknowledges, the first question presented in both *GEICO* and *Safeco* fairly includes the question "whether the court of appeals erred in articulating and applying the reckless-disregard standard." U.S. Br. I; *see also* Sup. Ct. R. 14.1(a). And the body of Safeco's petition (just like Geico's) unambiguously raised the application of the "willful" standard. Given that the application of a proper "willfulness" standard to the Ninth Circuit's judgments is an inherent part of the first question presented in both *Safeco* and *GEICO*, there is no basis for treating the former any differently from the latter.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court dismissing plaintiffs Burr's and Massey's claims.

2006); *Norwood v. Name Seekers Inc.*, Case No. 06-cv-436 (E.D. Wis. Dec. 15, 2006); *Bernal v. KeyBank, N.A.*, Case No. 06-C-008 (E.D. Wis. Dec. 14, 2006); *Johnson v. IndyMac Bank, F.S.B.*, Case No. 05-cv-856 (E.D. Wis. Nov. 27, 2006); *Ashby v. Farmers Group, Inc.*, No. 01-CV-1446, 2006 WL 3169381, at *1 (D. Or. Oct. 30, 2006); *Murray v. Cingular Wireless II, LLC*, No. 1:05-cv-01334 (N.D. Ill. Aug. 18, 2006) (staying appeal pending Seventh Circuit's decision in *Murray*, *supra*).

Respectfully submitted,

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